

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

AMY SNEATH)	
Claimant)	
)	
V.)	
)	
ADVANTAGE PRN, LLC)	CS-00-0155-583
Respondent)	AP-00-0448-073
)	
AND)	
)	
KANSAS WORKERS COMPENSATION)	
FUND)	

ORDER

STATEMENT OF THE CASE

The Kansas Workers Compensation Fund (Fund) requested review of the November 20, 2019, Order entered by Administrative Law Judge (ALJ) Pamela J. Fuller. Joseph Seiwert of Wichita, Kansas, appeared for claimant. Timothy A. Emerson of Wichita, Kansas, appeared for the Fund. Respondent did not appear. This case has been placed on the summary docket for disposition without oral argument.

The ALJ issued an Order in response to claimant's Post Award Motion to Assess Liability on the Kansas Workers Compensation Fund, finding the matter was properly before her court and ordered the Fund to pay all benefits due to claimant.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 19, 2019, Motion Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

The Fund argues the ALJ's Order should be reversed, and the ALJ lacked jurisdiction due to a previous appeal to the Board. The Fund argues the underlying Award¹ did not specify that respondent was unable to pay compensation. The Fund continues, "To

¹ ALJ Award (Aug. 9, 2018).

modify the Award with a generic order as opposed to utilizing the Review and Modification process allows for a substantive change to the law of the case without due process to the eventual paying party."² The Fund maintains the written findings in the underlying Award are final and res judicata as the appeal time has expired.

Claimant contends the Fund is liable to pay her benefits. Alternatively, claimant requests an Order Nunc Pro Tunc reflecting the Fund's admitted liability. Claimant further argues the Fund failed to previously list its liability status as an issue before either the Board or the Kansas Court of Appeals.

The issues for the Board's review are:

1. Was it proper for the ALJ to modify an underlying Award, originally entered solely against respondent, to assess liability against the Fund without a review and modification proceeding?
2. Is the Fund liable to pay claimant's benefits under K.S.A. 44-532a?
3. May the Fund raise new issues that were not raised or briefed before the ALJ or the Board?

FINDINGS OF FACT

Claimant sustained injury on August 10, 2008, while working for respondent. The ALJ initially found claimant's injuries did not arise out of and in the course of her employment. In an Order dated May 28, 2009, a single Board Member reversed the ALJ's decision, noting "travel to different medical facilities or nursing homes was an integral part of claimant's employment with respondent. As long as the trip or task is an integral or necessary part of the employment an injury during any portion of the trip or task is compensable."³

On January 30, 2009, respondent took the deposition of Lorraine Law to prove its insolvency. Notice to implead the Fund was filed on June 2, 2009. A Stipulated Order filed on July 20, 2009, allowed respondent's counsel to withdraw due to respondent's stated insolvency.⁴ In an Order for Compensation dated December 9, 2009, the ALJ noted respondent "was determined to be insolvent by the parties."⁵ An Agreed Order dated

² Fund Brief (filed Dec. 27, 2019) at 7.

³ *Sneath v. Advantage PRN, LLC*, No. 1,042,822, 2009 WL 1588638 (Kan. WCAB May 28, 2009).

⁴ See M.H. Trans., Ex. A.8 at 1.

⁵ M.H. Trans., Ex. A.6 at 1.

January 21, 2011, ordered respondent and the Fund to provide temporary total disability compensation to claimant beginning December 21, 2010, until further order or until claimant reached maximum medical improvement.

The matter came to regular hearing on December 13, 2017. In an Award dated August 9, 2018, the ALJ determined claimant to be permanently and totally disabled as a result of the work accident and awarded compensation to claimant and against respondent. The Fund appealed to the Board, arguing claimant was not in the course of her employment at the time of the accident. The Fund originally raised the issue of whether claimant was an employee or independent contractor, but withdrew the issue at oral argument with the Board. The Board affirmed the ALJ's Award in its Order dated January 31, 2019.⁶

The Fund appealed to the Kansas Court of Appeals on March 4, 2019, listing issues of: whether claimant sustained personal injury by accident arising out of and in the course of her employment, whether claimant was an employee of respondent, and the nature and extent of claimant's disability.⁷ The Fund voluntarily dismissed its appeal on April 22, 2019.

Claimant filed a Post Award Motion to Assess Liability on the Workers Compensation Fund with the Division on April 23, 2019. A motion hearing was held on November 19, 2019, with an Order granting claimant's request submitted the following day. The Fund appeals.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-532a states, in part:

(a) If an employer has no insurance to secure the payment of compensation, as provided in subsection (b) (1) of K.S.A. 44-532 and amendments thereto, and such employer is financially unable to pay compensation to an injured worker as required by the workers compensation act . . . the injured worker may apply to the director for an award of the compensation benefits, including medical compensation, to which such injured worker is entitled, to be paid from the workers compensation fund. Whenever a worker files an application under this section, the matter shall be assigned to an administrative law judge for hearing. If the administrative law judge is satisfied as to the existence of the conditions prescribed by this section, the administrative law judge may make an award, or modify an existing award, and prescribe the payments to be made from the workers compensation fund as provided in K.S.A. 44-569 and amendments thereto. The award shall be certified to

⁶ *Sneath v. Advantage PRN, LLC*, No. CS-00-0155-583, 2019 WL 528165 (Kan. WCAB Jan. 31, 2019).

⁷ See M.H. Trans., Ex. A.3 at 7.

the commissioner of insurance, and upon receipt thereof, the commissioner of insurance shall cause payment to be made to the worker in accordance therewith.

ANALYSIS

1. Was it proper for the ALJ to modify an underlying Award, originally entered solely against respondent, to assess liability against the Fund without a review and modification proceeding?

An Order to assess Fund liability post-award does not require a review and modification hearing pursuant to K.S.A. 44-528. K.S.A. 44-532a contains a provision allowing an injured worker to apply for a hearing to assess Fund liability, where an ALJ has jurisdiction to modify an existing Award and prescribe the compensation previously awarded to be paid by the Fund. This is what happened in this case.

The Fund had the opportunity and failed to present evidence of respondent's ability to pay or insurance coverage at both the regular hearing and the motion hearing. The Fund was not deprived of its right to due process. The ALJ properly applied the provisions of K.S.A. 44-532a.

2. Is the Fund liable to pay claimant's benefits under K.S.A. 44-532a?

The Kansas Court of Appeals considered the Fund's liability under K.S.A. 44-532a in the *Helms*⁸ decision and held that the injured worker does not have the burden to prove an employer is uninsured or unable to pay, and an award may be entered against the Fund. The burden therefore lies with the Fund to prove an employer is financially able to pay the compensation due claimant under the Kansas Workers Compensation Act.

Proof of respondent's ability to pay was provided through the deposition of Lorraine Law on January 30, 2009. No evidence was presented to rebut respondent's evidence of respondent's inability to pay. The ALJ did not err in assessing liability against the Fund pursuant to K.S.A. 44-532a.

3. May the Fund raise new issues that were not raised or briefed before the ALJ or Board?

Claimant argues the Fund failed to previously list its liability status as an issue before either the ALJ or the Board. K.S.A. 44-532a contains no limitation regarding when the issue of fund liability may be raised. As such, if the issue is raised by a claimant or respondent, the Fund may raise defenses to a motion to confer liability on the Fund.

⁸*Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

CONCLUSION

The ALJ properly applied the provisions of K.S.A. 44-532a. The ALJ did not err in assessing liability against the Fund pursuant to K.S.A. 44-532a. The Fund has a right to defend itself at any time, when the issue of Fund liability is raised by a party.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated November 20, 2019, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2020.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

copies via OSCAR to:

Joseph Seiwert, Attorney for Claimant

Timothy A. Emerson, Attorney for Kansas Workers Compensation Fund

Hon. Pamela J. Fuller, Administrative Law Judge